Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1275

AL STAR, AS MANAGER & PRESIDENT OF FAYETTE NEWS CENTER AND GAYETY BOOKS,

Petitioners,

v.

CHARLES L. BENTON, INDIVIDUALLY AND AS DIRECTOR OF FINANCE, CITY OF BALTIMORE; WILLIAM DONALD SCHAEFER, INDIVIDUALLY AND AS MAYOR OF THE CITY OF BALTIMORE; GEORGE L. RUSSELL, JR., SOLICITOR FOR THE CITY OF BALTIMORE; AND JOHN A. LUETKEMEYER, JR., TREASURER OF THE CITY OF BALTIMORE,

Respondents.

RESPONDENTS' BRIEF

BENJAMIN L. BROWN,
City Solicitor,
AMBROSE T. HARTMAN,
Deputy Solicitor,
HARRY S. SWARTZWELDER, JR.,
Associate Solicitor,
RICHARD K. JACOBSEN,
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The Daily Record Co., Baltimore, Md. 21202

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ARGUMENT

I.

The Petitioners argue that the imposition of the licensing fee is a prior restraint on their freedom of expression. This is incorrect. Commercial enterprises dealing in First Amendment materials or exercising First Amendment rights are not immune from reasonable taxation, *Grosjean v. Am. Press Co.*, 297 U.S. 233

(1935) (newspapers); *Chemline, Inc. v. City of Grand Prairie,* 364 F.2d 721 (5th Cir. 1966) (movie theatre); *City of Corona v. Corona Daily Independent,* 115 Cal. App. 2d 382, 252 P.2d 56, *cert. den,* 346 U.S. 833 (1952); *Soof v. City of Highland Park,* 30 Mich. App. 400, 196 N.W. 361 (1971) (coin-operated movie machines). The cases cited by the Petitioners on this point are those in which the Court felt compelled to strike a balance between the welfare of the public and the rights of the exhibitor guaranteed by the First Amendment of the Constitution. All of the cases are ones in which the city or township made a conscious effort to curtail a specific activity, i.e., door-to-door canvassing, the distribution of pamphlets, conducting a parade or rally and where legitimate standards for controlling such activities were lacking. In this case Judge Young in the District Court found as a fact that the licensing fee was being imposed by Baltimore City in a uniform non-discriminatory manner on all coin operated amusement devices to defray the cost of policing those establishments utilizing such machines (A. 8).

In their Brief the Petitioners have attempted to distinguish the facts in this case from those in *Cox v. New Hampshire,* 312 U.S. 569 in which this Court held that the licensing fee was proper because the authorities were not invested with any arbitrary discretion to issue or refuse licenses. The Petitioners argue that such is not the case here, yet the uncontradicted evidence is that the license on the coin operated machines, including the "peep show" devices can only be revoked if the exhibitor fails to pay the tax. This is the sole reason which would justify revocation. The City admitted this in its presentation to the District Court and the Court assumed this in its opinion, (A. 10).

II.

The Petitioners argue that the Director of Finance has full power to refuse the grant of licenses and that no standards or guidelines are set forth in Section 71, Article 15, Baltimore City Code. None are needed for the reasons previously stated. There was testimony that licenses such as these had been revoked by the City from time to time but there was nothing to suggest that said licenses were revoked for any reason but the non-payment of the licensing fee. If there was any evidence to the contrary available it was the Petitioners' burden to prove this, *Lewis v. M. & C.C. of Cumberland,* 189 Md. 58, 54 A.2d 319; *VET. Taxi Ass'n. v. Yellow Cab Co.,* 192 Md. 551, 65 A.2d 173; *Tar Products Corp. v. Tax Comm'n.,* 176 Md. 290, 297, 4 A.2d 462. The Petitioners cite *Soof, supra* as the cornerstone of their argument. There wide discretion was given to the authorities to revoke the license on coin operated machines for any reason and therefore the case is clearly distinguishable from the case at bar. The Petitioners say that there is a similarity between the cases because Benton, et al have the sole discretion to determine whether these machines are coin operated amusement devices. These machines provide amusement and they are coin operated. No special talent need be employed to conclude that they are "coin operated amusement devices".

On Page 28 of Petitioners' Brief they cite the case of *Gonzales, A. v. Ghingher,* 218 Md. 132, 145 A.2d 769, in which the refusal to license bloodless bull fights were overturned by the Maryland Court of Appeals. They cite this case because it involves the application of Article 15, Baltimore City Code (the license article) and they have erroneously concluded that the Court's holding in that case applies equally to Section 71, Article 15. Their reliance on this case is misplaced. As Judge Young

pointed out in his opinion in the District Court, some sections of Article 15 require fixed standards for their enforcement and others such as Section 71 do not. In order to obtain a license under Section 71 the only standard which must be met is the payment of the licensing fee. Next the Petitioners argue that there should be some judicial review in cases where the license is revoked. Since there are no standards to meet, save the payment of the licensing fee, a judicial review of such cases would be meaningless. Judge Young found as a fact that there were no rules or regulations promulgated under Article 15 for enforcement and collection of fees (A. 5) and found as a matter of law that the failure to pay the licensing fee would be the only legitimate reason for revoking a license pursuant to Article 15, Section 71, Baltimore City Code, (A. 10).

III.

The Petitioners argue that they are being taxed by Baltimore City under Article 32, Section 149, Baltimore City Code. Section 149 was added to Article 32, Baltimore City Code by Ordinance No. 811, approved February 26, 1975, nearly a year and one half after Judge Young's decision in the case at bar. Since it was not passed until long after this case was decided by the Federal District Court it is irrelevant to the issues presented here.

Finally, the Petitioners have branded Section 71 as "prohibitory" and have suggested that the licensing fee is disproportionate to their earnings. They suggest that the payment of this licensing fee is a hardship because it amounts to six hundred individual $.25 "peep show" transactions. This ignores the fact that a customer transacting business on one of these machines must insert a series of quarters in order to receive the

ultimate "amusement" potential which he (and the exhibitor) desires. See the description of these machines in *Sanza v. Md. Board of Censors,* 245 Md. 319, at pages 327, 328 and 331. In any event, no proof was offered to suggest that the licensing fee is confiscatory. Judge Young found as a fact that the record was silent as to the income from the machines and lacked any data to show that a tax of $150.00 was truly prohibitive, (A. 4).

CONCLUSION

For the reasons stated herein the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BENJAMIN L. BROWN,
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